Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

TERESA L. LUKE AND ANDREW R. LUKE, INDIVIDUALLY AND ON BEHALF OF THEIR MARITAL COMMUNITY; AND TERESA L. LUKE, AS GUARDIAN AD LITEM FOR HER MINOR CHILDREN, H. R. LUKE AND R. A. LUKE,

*Petitioners,*

V.

EMERGENCY ROOMS, P.S., A PROFESSIONAL SERVICE CORPORATION OF WASHINGTON STATE D/B/A FAMILY CARE AND URGENT MEDICAL CLINICS AND FAMILY URGENCY CARE CLINICS MINNEHAHA; ROBERT D. THORNTON, M.D.; ET AL

*Respondents.*

**On Petition for a Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Is the district court required to follow it's own Fed. R. Civ. P. 16 scheduling order in considering the non-movants' expert evidence in a subsequent summary judgment hearing?

(2) Did the district court err in failing to provide the non-moving party the benefit of all reasonable doubts and inferences in finding that earlier submitted expert witness disclosures failed to establish a genuine issue of material fact?

Plaintiffs sued defendants for medical negligence for failing to perform basic blood tests when beginning the drug Antabuse. As a result of the failure to perform the blood tests, plaintiff Teresa Luke required a liver transplant when the Antabuse destroyed her liver.

During discovery the district court entered an order modifying Fed. R. Civ. P. 26(a)(2) to permit opinions from depositions to be admissible and extended deadlines for disclosure of expert opinion.

Defendants conceded negligence and moved for summary judgment on causation. Plaintiffs filed five expert declarations in opposition. Without acknowledging or discussing it's own scheduling order, the district court found the declarations to be "late", refused to consider them and dismissed the case. The Ninth Circuit, in a 2-1 decision, affirmed, the dissent stating that the majority failed to give the non-moving party the benefit of all reasonable doubts and inferences from the opinions contained in the witness disclosures.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The petitioners here and appellants below are Teresa L. Luke and Andrew R. Luke, individually and on behalf of their marital community; and Teresa L. Luke, as Guardian ad Litem for her minor children, H. R. Luke and R. A. Luke,

The appellees below and respondents here are Emergency Rooms, P.S., a Professional Service Corporation of Washington State d/b/a Family Care and Urgent Medical Clinics and Family Urgency Care Clinics Minnehaha; Robert D. Thornton, M.D.; Howard Bruce Goodwin, PA-C.

Pursuant to Rule 29.6, petitioners state that plaintiffs are individuals and are not corporate entities.

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## OPINIONS BELOW

The opinion of the Court of Appeals is unpublished but is found at 2009 WL 886350(9th Cir.(Wash.)) and is reprinted in the Appendix to the Petition ("Pet. App.") at A1. The District Court's opinion is unpublished but is found at 2008 WL 410672 (W.D. Wash.) and is reprinted in Pet. App. at B1.

The related prior opinion of the Court of Appeals is unpublished but is found at 246 Fed.Appx. 421, 2007 WL 2461850 (C.A.9 (Wash.)) and is reprinted in Pet.App. at C1. The District Court's opinion resulting in that appeal is unpublished but is found at 2005 WL 3533616 (W.D. Wash.)) and is reprinted in Pet. App. at D1.

## JURISDICTION

The Court of Appeals entered its judgment on March 30, 2009. This Court has jurisdiction under 28 U.S.C. § 1291. Original jurisdiction in the District Court is under 28 U.S.C. § 1332.

## COURT RULES INVOLVED

This case involves Fed. R. Civ. P. 26(a)(2)(C), Fed. R. Civ. P. 26(e)(1), Fed. R. Civ. P. 37(c)(1) and Fed. R. Civ. P. 16(b)(6).

## STATEMENT OF THE CASE

The district court completely ignored its own Fed. R. Civ. P. 16 order expanding admissible expert opinion including deposition testimony and dismissed plaintiffs' claims. The Ninth Circuit perpetuated this legal error with neither court ever acknowledging or discussing the Fed. R. Civ. P. 16 scheduling order in either decision. Further, the Ninth Circuit failed to construe all reasonable

inferences in favor of the non-moving party. As recognized in the dissenting opinion, the district court's dismissal should be reversed. These collective reversible errors have deprived Teresa Luke of her day in court. Absent Supreme Court intervention, her right to a jury trial will be forever foreclosed.

### A. Factual Background

Teresa Luke, age 32, is married to Andrew Luke and has two children, H. R. Luke, age 12 and R. A. Luke, age 9. On March 7, 2002, Ms. Luke was cited for driving under the influence in Vancouver, Washington. As a condition for her release from jail, the judge of Vancouver District Court directed her to take the drug Antabuse, designed to stop people from drinking, and was directed to report to the defendant Clinic.

On March 12, 2002, Ms. Luke saw H. Bruce Goodwin, PA-C, a physician assistant practicing at defendant Clinic in Vancouver, WA. Mr. Goodwin prescribed Antabuse to Ms. Luke without performing recognized baseline and follow up liver function tests; without advising Ms. Luke to be on the lookout for symptoms of hepatitis; without having a plan for follow up physical examination; without informing Ms. Luke of the material risk of hepatitis with Antabuse, a known potentially hepatotoxic drug; and without discussing with Ms. Luke the need for simple baseline and follow up liver function tests. Ms. Luke saw Mr. Goodwin only once, on March 12, 2002, the day he wrote the prescription for Antabuse.

After receiving the Antabuse prescription from Mr. Goodwin, Ms. Luke went to defendant Pharmacy, located across the street from defendant Clinic, where the prescription was filled. The Antabuse medication was mixed into a slurry by the pharmacist, and was then administered to

Ms. Luke by the pharmacist who then observed her drink the slurry, and recorded her compliance in taking the Antabuse on a court required log. Ms. Luke visited defendant Pharmacy 36 times between March 12, 2002 and June 3, 2002.

On June 3, 2002, Ms. Luke reported to the pharmacist that she was having nausea and vomiting and that when she had taken the Antabuse, her stomach felt like it was cramping up really bad. She also pointed out that the corners of the whites of her eyes were starting to turn yellow.

Later that same day, Ms. Luke returned to defendant Clinic where she was seen by a physician. Liver tests were obtained and revealed abnormally elevated liver enzymes. Five and a half weeks later, on July 12, 2002, Ms. Luke underwent a liver transplant.

After Ms. Luke experienced fulminant liver failure, which necessitated a liver transplant as a direct and proximate result of the Antabuse, the Luke Plaintiffs filed suit against defendant Clinic and defendant Pharmacy. It is undisputed that the drug, Antabuse, was ordered, administered and monitored without anyone ordering or obtaining baseline liver function studies or follow up liver function studies on Ms. Luke. These studies are universally recommended in the practice of medicine when prescribing Antabuse.

It is also undisputed that Ms. Luke was never advised by any of the defendants of the need for liver function tests or of her risk of liver failure from Antabuse. Two separate motions for summary judgment were filed, one by defendant Pharmacy and the other by defendant Clinic. The district court granted both motions. (The dismissal of defendant Pharmacy is not at issue here.)

In its summary judgment motion, defendant Clinic sought dismissal of all claims, or, alternatively partial summary judgment, on the basis that the Luke Plaintiffs could not prove that

any action or inaction of defendants caused them any harm.[1]

In response, the Luke Plaintiffs argued that expert witness disclosures established a prima facie case of causation and in addition submitted declarations from five (5) competent experts establishing duty, breach, causation and damage on all elements of the claims. Those witnesses were Dr. John Rabkin, a liver transplant surgeon; Dr. Andrew Saxon, head of the Seattle Veteran's Administration Hospital Department of Addiction Medicine who prescribes Antabuse; Dr. Christopher Corless, the pathologist who examined Ms. Luke's liver after it was surgically removed; Dr. Phyllis Hollenbeck, a family practitioner; and Morris Faiman, Ph.D., a professor of Pharmacology and a Pharmacist at the University of Kansas.

The district court made no reference, whatsoever, in its opinion to the sworn testimony of the plaintiffs' exhaustively detailed declarations from these five (5) competent expert witnesses, and without hearing oral argument, dismissed plaintiffs' claims against defendant Clinic on December 22, 2005.

Plaintiffs appealed to the Ninth Circuit, which reversed and remanded for a determination by the district court regarding the admissibility of the declarations. On remand the district court held the declarations to be "late" and ignored its own order which is reprinted in Pet. App. At E1. The Ninth Circuit on appeal of that order affirmed in a 2:1 decision. Petitioners now seek a Writ of Certiorari.

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[1] Issues additionally raised were that the Luke Plaintiffs could not state an informed consent claim; and that the Luke Plaintiffs were unable to state the elements of a claim against Dr. Fisher, who treated Ms. Luke for a tick bite on April 30, 2002, at defendant Clinic. The district court granted dismissal of those claims, the Ninth Circuit affirmed, and plaintiffs did not further appeal the dismissal of those claims and they are therefore not at issue here.

## B. Proceedings Below

On November 11, 2004, the Plaintiffs filed a medical negligence suit against the defendants/appellees. The Plaintiffs alleged that the defendants violated the standard of care in regards to the prescription and, administration, of the drug Antabuse[2], and the violation was a direct and proximate cause of Ms. Luke's fulminant liver failure, which necessitated a liver transplant on July 12, 2002.

On July 13, 2005, defendant Pharmacy filed a Motion for Summary Judgment. The district court granted defendant Pharmacy's motion on August 31, 2005. [3]

On November 18, 2005, defendant Clinic filed a Motion for Summary Judgment. The Luke Plaintiffs submitted declarations from five competent medical experts establishing duty, breach, causation and damage on all elements of the claim. Making zero reference to these declarations, the district court granted defendant Clinic's motion on December 22, 2005. Plaintiffs appealed on January 19, 2006, and the Ninth Circuit in Appeal No. 06-35056 in a memorandum decision upheld dismissal of the Pharmacy defendants and dismissal of some but not all of the Clinic defendants and reversed and remanded for a determination by the district court of consideration of admissibility of plaintiffs' submitted declarations and to consider the motion for summary judgment anew. An amended mandate was entered on

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[2] Antabuse is also known as Disulfiram.

[3] Defendant Pharmacy's motion was granted by the district court. On appeal, the Ninth Circuit upheld the dismissal. Plaintiffs did not further appeal that decision and therefore no issues are before this Court regarding the Pharmacy defendants.

September 27, 2007. Following the mandate, the defendant Clinic filed a motion to strike and renewed their motion for summary judgment. The district court granted those motions and a second appeal to the Ninth Circuit followed.

The Ninth Circuit majority, making no reference to the order (Pet. App. at E1) entered by the district court judge which modified the expert testimony disclosure requirements, described the declarations as "late", refused to consider them and dismissed the case on March 30, 2009. The dissent by M. Smith, Circuit Judge, stated that the majority had failed to give all favorable inferences to the plaintiffs based on the original expert disclosures and stated the decision of the district court should be reversed. This Writ of Certiorari follows.

## REASONS FOR GRANTING THE PETITION

### The Ninth Circuit Has Sanctioned A Complete Departure From The Accepted And Usual Course Of Judicial Proceedings Calling For This Court To Exercise Its Supervisory Power.

#### A. The District Court Should Not Be Allowed to Disregard Its Own Order Dated September 26, 2005.

The district court signed an order on stipulation of the parties modifying the pretrial scheduling order. It is well established law that the final pretrial scheduling order of the court supercedes all pleadings and controls the subsequent course of the case. Rockwell International Corp., et.al. v. United States, et. al., 549 U.S. 1397, 127 S.Ct. 1397, L.Ed.2d 190 (2007).

Fed. R. Civ. P. 16 governs pretrial conferences and scheduling management. Fed. R. Civ. P. 16

requires the court to issue a scheduling order setting procedures for discovery and trial. The order is binding unless subsequently modified by the court.

Fed. R. Civ. P. 16 (b) provides that the pre trial schedule may be modified for good cause and with the judge's consent. Pursuant to Fed. R. Civ. P. 29, Stipulations About Discovery Procedure, subsection (b), a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

Plaintiffs submitted their expert declarations in response to the summary judgment within the time frame set by the court's order. Both the district court and the Ninth Circuit have failed to abide by the district court's own order.

### B. The District Court's Order

The decision of the district court appealed from has as its foundation a "failure" of plaintiffs to "comply with the scheduling orders and Fed. R. Civ. P. 26(a)(2)." Fed. R. Civ. P. 16 provides for the court to enter scheduling orders regarding disclosure of witnesses pursuant to Fed. R. Civ. P. 26(a) and Fed. R. Civ. P. 26(e)(1). Fed. R. Civ. P. 16(b)(6) provides that scheduling orders may be modified by the court. The parties stipulated in March 2005 that the initial disclosures were waived. The original scheduling order called for disclosure of expert reports and opinions on August 22, 2005. On August 9th, defense counsel forwarded a letter and proposed stipulation, to modify the scheduling order to:

> ... allow experts to testify about matters which may be covered in their depositions, but which may have been omitted from their witness statements. It

> does not allow testimony about matters which are not covered in either the statement or the deposition. Accordingly, since all matters about which testimony will be allowed were disclosed in one fashion or the other, there should be no prejudice to any party through the stipulation. (Emphasis supplied).

Counsel for the parties conferred and agreed specifically that experts named would be allowed to testify to all matters within the disclosure and within their deposition testimony. This was reduced to a stipulation signed by counsel and an order was entered by this court on September 26, 2005. The language of the Stipulation and Order (Pet. App. At E1.) is:

> The parties hereby stipulate as follows:
>
> 1) Expert disclosures and reports will be exchanged in accordance with the calendar established by the court, but such reports need not be "prepared and signed" by each expert; and
>
> 2) In addition to being permitted to testify about matters addressed in each expert witnesses' disclosure, a properly disclosed expert is also permitted to testify regarding any matters addressed in that expert's deposition.
>
> The purpose of the foregoing stipulation is, respectfully, 1) to facilitate preparation and exchange of reports, and 2) to allow testimony regarding relevant matters which may have been omitted from the disclosure statements, where the omission causes no prejudice since the

> omitted matter was addressed in an expert's deposition. (Emphasis supplied).

### C. The District Court Misread and Misquoted Plaintiffs' Disclosures.

The district court, at page 5 of its decision (Pet. App. B1) Striking Expert Declarations and Granting Summary Judgment, shows its erroneous reading of the plaintiffs' disclosures. The Order states at Pet. App. B6:

> "All of Plaintiffs' experts in initial disclosures stated that the change in liver functions **could not be detected until sometime between two and four weeks** after initiation of Antabuse, thereby acknowledging that on a more likely than not basis, the elevated liver levels would not be detectable until the 28th day after Ms. Luke started taking Antabuse." (Emphasis supplied).

The district court incorrectly states the disclosure language and substitutes words that are not there. The words "could not be detected" appear nowhere in plaintiffs' disclosures or anywhere else in any of plaintiffs' pleadings. The words "until sometime" again are words that do not appear anywhere in plaintiffs' disclosures or anywhere else in any of plaintiffs' pleadings. The district court order on its face recites incorrect quotations and establishes the erroneousness of its decision.

## D. The Plaintiff's Experts.

Plaintiffs submitted five (four are discussed here) expert declaration, all within the time frame allowed by the motion and by the order (Pet. App. E1)

### 1. John Rabkin, M.D.

Dr. Rabkin is a transplant surgeon. The substance of his testimony was disclosed in the expert witness disclosures on August 22, 2005. Dr. Rabkin signed a declaration on December 8, 2005 which was timely submitted in opposition to defendants' motion for summary judgment. Eight days later, on December 16, 2005, and four days after the declaration had been filed with the court, Dr. Rabkin's deposition was taken wherein he detailed his opinions. Defendants' counsel specifically asked Dr. Rabkin his opinion as to when liver function tests would be elevated:

> Q. Now, I'm going to ask you the question like we do in court, on a more probable than not basis, in other words 51 percent, more likely than not, two weeks after she started Antabuse, knowing that her symptoms don't appear until late in May, on a more probable than not basis, is it your opinion that the liver function tests would have been abnormal two weeks after she was given the medication?
>
> A. Yes.

Clearly, Dr. Rabkin's deposition testimony establishes that testing at two weeks would have shown an abnormality. Equally clear is that this testimony is admissible by the order of the court of

September 26, 2005 which allowed "any matter" either in the disclosures or in deposition to be admissible testimony at trial.

**2. Andrew Saxon, M.D.**

Dr. Saxon is a practicing psychiatrist who regularly prescribes the drug Antabuse and has written in the medical literature about its risks. He was deposed on August 23, 2005, well prior to the summary judgment. His declaration in connection with the summary judgment was submitted on December 8, 2005. The disclosure of his testimony occurred on August 22, 2005. In the witness disclosure for Dr. Saxon it was stated as follows:

> It is Dr. Saxon's opinion based on reasonable medical probabilities that Ms. Luke's baseline liver function studies would have been normal on March 12, 2002. Assuming her baseline liver studies were normal on March 12, 2002, it is his further opinion that between two and four weeks after beginning Antabuse, Ms. Luke's liver function studies would have been abnormally elevated .... Had PA-C Goodwin obtained a follow-up liver function study within two to four weeks after prescribing Antabuse, more likely than not Teresa Luke's liver function studies would have been abnormally elevated.[4] (Emphasis supplied).

Dr. Saxon was asked in his deposition at page 40 the very next day following disclosure, on

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[4] This language appears in the expert witness disclosure statement for Dr. Hollenbeck and Dr. Rabkin.

August 23, 2005, his opinion about when liver function studies would have been abnormal, as follows:

> Q. And you're looking at this case knowing that we can't say for sure what her initial test would be. But I think you said there's nothing to indicate it would have been elevated. Is there a point in this case looking back at it where you feel she would have started to have abnormal liver function findings?
>
> A. You know, based on what we see in the literature that the -- these hepatotoxic reactions seem to occur fairly early after starting the Antabuse. So it's highly likely that within a couple weeks or so there would have been some indication on laboratory testing that there was an abnormality. (Emphasis supplied).

3. **Phyllis Hollenbeck, M.D.**

Dr. Hollenbeck is a family practitioner. Her opinions were disclosed in the expert witness disclosure on August 22, 2005.

Dr. Hollenbeck signed a declaration on December 11, 2005 for submission in opposition to defendants' motion for summary judgment. Dr. Hollenbeck's deposition was arranged and then cancelled after the Order Granting Summary Judgment was entered. In her declaration, Dr. Hollenbeck stated:

> 2. If, as I believe, Mrs. Luke suffered from an idiosyncratic reaction to Antabuse, her liver laboratory studies would have, more likely than not, been

> elevated anytime following 10 days of initiation of the drug. It is my opinion, therefore, that if Physician Assistant, Goodwin, had complied with the standard of care, more likely than not, the Antabuse would have been discontinued and Mrs. Luke would not have needed the liver transplant. (Emphasis supplied).

If her deposition had gone forward, these opinions would have been part of her testimony and would have been admissible.

**4. Christopher Corless, M.D.**

Dr. Corless is a pathologist who examined Teresa Luke's liver which had been removed as part of her transplant procedure. Dr. Corless was disclosed as a fact witness and then defendants took his deposition on May 3, 2005. Dr. Corless signed a declaration on December 12, 2005, which was submitted to the district court in opposition to the motion for summary judgment. Dr. Corless stated in his declaration, as follows:

> 4. Based on the fact that my pathologic diagnosis of June 21, 2002 revealed a severe form of cholestatic hepatitis with loss of approximately 50% of the hepatocellular parenchyma, and my pathologic diagnosis of Mrs. Luke's native liver specimen three weeks later (on July 17, 2002) which revealed massive hepatocyte necrosis and marked cholestasis of remaining parenchyma, with a near total loss of hepatocytes in the majority of the specimen, it is my opinion, based on reasonable medical probabilities, "more likely than not," that Mrs. Luke's liver function was beginning

> to be compromised by the hepatotoxic drug Antabuse soon after initiation of Antabuse on March 12, 2002. **If Mrs. Luke had had liver function testing at anytime between March 26, 2002 and June 3, 2002, her liver function tests, specifically her AST, ALT and bilirubin levels, more likely than not, would have been elevated above normal values, which would have represented abnormal liver cell death, or a loss of hepatocytes**. This finding is consistent with subfulminant hepatitis, which tends to develop over time in response to a drug, such as Antabuse, and prior to demonstrated clinical signs and symptoms. (Emphasis supplied).

Dr. Corless' declaration is clearly confined to March 26 to June 3, which is the "two to four week period" following beginning of the Antabuse. His declaration further stated:

> 5. It is my further opinion that if LFT testing had been undertaken between 2-4 weeks after initiating Antabuse (between March 26, 2002 and April 9, 2002) more likely than not, Mrs. Luke's LFTs would have been elevated above normal values. It is my further opinion, that if Mrs. Luke's LFT's were abnormally elevated between 2-4 weeks and her Antabuse discontinued, she would not have gone on to suffer subfulminant hepatitis, which necessitated a liver transplant. (Emphasis supplied).

The stipulation and order entered by this court on September 26, 2005, states that "any matter" provided in the disclosure or testified to in deposition would be admissible testimony at trial.

### E. The Expert Witness Disclosures Submitted by Plaintiffs Were Timely, Complied With Fed. R. Civ. P. 26 and Made Out a Prima Facie Case of Causation.

Plaintiffs made their expert witness disclosures, timely, on August 22, 2005. The disclosures were in accord with the modified scheduling order entered on March 22, 2005. The expert witness disclosures for witnesses Dr. Rabkin, Dr. Saxon, and Dr. Hollenbeck contained identical language relating to causation. For example, the relevant disclosure language is as follows as taken from Dr. Rabkin's disclosure:

> 1.2 Complete Statement Of All Opinions To Be Expressed
>
> It is Dr. Rabkin's opinion based on reasonable medical probabilities that Minnehaha Clinic and, specifically, PA-C Goodwin, fell below the standard of care in treating Ms. Luke with the medication, Antabuse, when they failed to do a complete laboratory workup prior to prescribing Antabuse. PA-C Goodwin should have performed baseline liver function studies on March 12, 2002. He should have informed Ms. Luke of the need to return for follow-up liver function studies **within two to four weeks** to make sure she wasn't having any kind of problem related to the medication. In terms of prescribing drugs that may be

hepatotoxic, such as Antabuse, it is a general principle of medicine that a certain standard of care will be followed, which would include pre administration liver enzyme testing and physical exam, to make sure patients don't have underlying liver disease, and close follow up/monitoring of liver enzymes **within two to four weeks**, which also includes a physical exam. If the liver function results were normal **between two and four weeks**, then the standard of care would be to recheck liver function tests at six months and do a physical exam at that time, as well. In this case, it was below the standard of care to for PA-C Goodwin to fail to perform baseline liver function studies on March 12, 2002, and below the standard of care not to have the Ms. Luke return to the clinic **within two to four weeks** for follow-up liver enzyme testing and physical exam.

It is Dr. Rabkin's opinion based on reasonable medical probabilities that Ms. Luke's baseline liver function studies would have been normal on March 12, 2002. **Assuming her baseline liver studies were normal on March 12, 2002, it is his further opinion that between two and four weeks after beginning Antabuse, Ms. Luke's liver function studies would have been abnormally elevated.** The basis for his opinion is that with all the drugs physicians monitor for liver toxicity, such as the statin drugs, the TB drugs, if a patient is going to have an idiosyncratic reaction, it's usually **within two to four weeks** of initiating the drug. That's why the standard of care is to perform pre

> administration liver function studies and then again **within two to four weeks** after starting a hepatotoxic drug. It is his opinion that a person will usually have abnormal liver function tests before they have symptoms associated with liver toxicity.
>
> It is Dr. Rabkin's opinion based on reasonable medical probabilities that Teresa Luke's subfulminant hepatitis and resultant liver transplant were caused by an idiosyncratic reaction to Antabuse. Had PA-C Goodwin obtained a baseline liver function study on Teresa Luke on March 12, 2002 before prescribing Antabuse, more likely than not, it would have been normal. **Had PA-C Goodwin obtained a follow-up liver function study within two to four weeks after prescribing Antabuse, more likely than not Teresa Luke's liver function studies would have been abnormally elevated.** If Antabuse was discontinued on Teresa Luke when her liver enzymes were abnormal **two to four weeks** after starting Antabuse, more likely than not, she would not have gone on to suffer subfulminant hepatic failure and required a liver transplant. (Emphasis supplied)

There are nine references to the "two to four week" period. Each reference is designed to make it clear that there should have been follow up testing in the two to four week period and that if such testing had been done during that period, it would have shown abnormal elevation of liver enzymes.

There are two portions of the disclosure of Dr. Rabkin's opinions where there is a clear statement

that the liver enzymes would have been elevated at between two and four weeks. The first is as follows:

> It is Dr. Rabkin's opinion based on reasonable medical probabilities that Ms. Luke's baseline liver function studies would have been normal on March 12, 2002. Assuming her baseline liver studies were normal on March 12, 2002, **it is his further opinion that between two and four weeks after beginning Antabuse, Ms. Luke's liver function studies would have been abnormally elevated.** (Emphasis supplied)

Again, there can be little question that this disclosure language raises issues of material fact. The second is:

> **"Had PA-C Goodwin obtained a follow-up liver function study within two to four weeks after prescribing Antabuse, more likely than not Teresa Luke's liver function studies would have been abnormally elevated."**

A plain reading of this sentence is that the "two to four weeks" refers to a time frame that PA-C Goodwin should have obtained follow up liver function studies and "more likely than not Teresa Luke's liver function studies would have been abnormally elevated." Even if this sentence were subject to more than one reasonable interpretation, the inference that must be given would be in favor of the plaintiffs as the non-moving party. See Anderson v. Liberty, supra. The inference here is that anytime that follow up studies were done in

the two to four week period, the testing would have shown abnormal elevation of the liver function studies. This disclosure language alone gives rise to an issue of material fact on causation that must result in denial of the summary judgment and reversal of the district court's decision.

Dr. Rabkin's declaration submitted in response to defendant Clinic's motion for summary judgment, reads in pertinent part:

> It is my opinion, more likely than not, that had LFTs been obtained at anytime beginning 10 days after initiating Antabuse (March 22, 2002) through June 3, 2002, the LFTs would have been abnormally elevated, signifying liver cell death. It is my further opinion that if Mrs. Luke's LFTs were abnormally elevated between two to four weeks and Antabuse stopped, she would not have developed subfulminant hepatitis which necessitated a liver transplant.

This declaration testimony establishes that between the two to four week period after initiating Antabuse, LFTs would have been abnormally elevated. There is nothing inconsistent with these expert witnesses stating that the beginning time when liver function studies would be elevated would be at ten days following initiation of the Antabuse and stating in the witness disclosures that if there had been testing at any time between two and four weeks after initiation of the Antabuse that the liver function studies would have been abnormal.

Dr. Rabkin reiterated his disclosure and declaration opinions in his deposition on December 16, 2005:

> Q. Now, I'm going to ask you the question like we do in court, on a more probable than not basis, in other words 51 percent, more likely than not, two weeks after she started Antabuse, knowing that her symptoms don't appear until late in May, on a more probable than not basis, is it your opinion that the liver function tests would have been abnormal two weeks after she was given the medication?
>
> A. Yes. (Emphasis supplied)

### F. Defendants' Own Experts Acknowledge the Fact That Testing During the 2-4 Week Time Frame Would Yield Abnormal Liver Enzymes.

Samuel Cullison, M.D., a family practitioner specializing in addiction medicine and hired by the defense, is the supervisor at Evergreen Treatment Services. The protocol regarding Antabuse treatment at Dr. Cullison's clinic states:

> After the initiation of Antabuse treatment the Medical Provider will schedule an initial follow-up 10-14 days later to repeat hepatic function tests. (Emphasis supplied).

Dr. Cullison testified, that if Teresa Luke had been seen in follow-up by Mr. Goodwin in the middle of May (60 days following the start of the Antabuse therapy), "it's likely that the damage to her liver would have been less severe had that occurred."

Another expert called by defense was Jeffrey Fullman, M.D., a Board certified internist. Dr. Fullman felt that reasonably prudent care of a patient placed on Antabuse involves doing liver function tests, including follow-up lab testing. As he testified on December 7, 2005:

> Q. Would it be fair to say that it would be below the standard of care for a health-care provider not to do a follow-up liver function test at some point on a patient that they've started on Antabuse?
>
> A. It would be best to have done liver function tests or do liver function tests on a patient who is on Antabuse at some point.

Dr. Fullman testified that he would typically repeat follow-up labs at between four and eight weeks and that, in this case, if liver function tests had been carried out between March 22 and May 6 (which is 10 days to 54 days after the Antabuse was started), those liver function tests would have been abnormal.

> Q. Would it be fair to say that more likely than not if liver function tests had been carried out between March 22 -- which would be 10 days after she started the Antabuse -- to May 6, that during that time period, if liver function tests had been done at some point, more likely than not that would have revealed the subfulminant hepatitis?
>
> A. **More likely than not the liver function tests would have been abnormal during that time frame you described**. (Emphasis supplied).

Even defendant's own experts acknowledge that beginning 10 days after initiating Antabuse, liver function tests would have been abnormal. Dr. Fullman's deposition was taken on December 7th, which was prior to plaintiffs' response to defendant Clinic's motion for summary judgment and over two and a half months before trial on February 27, 2006. Defendant is in no way prejudiced or harmed.

### G. Plaintiffs Expert Monique Martel, ARNP, who Prescribes and Monitors Antabuse, Testified That Liver Function Studies would be Elevated Beginning Prior to Two Weeks

On August 29, 2005, defense counsel deposed Monique Martel, ARNP, from Denver, one of plaintiffs' experts. She prescribes and monitors patients on Antabuse and rendered her opinion that the enzymes would be elevated beginning at two weeks following initiation of Antabuse. She testified in response to defendant Clinic's counsel questioning as follows:

> Q. Okay. What I'm really asking you is not when it could have. Just as an expert witness, have you gone through to analyze this situation to determine at what point you feel confident, or at least at a more probable than not basis, her hepatic panel would have shown elevation?
>
> A. You are talking about based on my patients, what I have seen, as far as my patients?
>
> Q. As far as your expertise?

A. Okay, because I certainly have seen that within the first—if you see a patient within two to four weeks, you will pick up something the majority of the time. And if you wait too long, those liver enzymes continue to increase. So I just – this is so important to immediately check those liver enzymes, because they kick in so quickly. They have to be—you have to catch it immediately.

## H. The District Court Erred in Its Application of The Federal Rules of Civil Procedure and Case Authority.

Fed. R. Civ. P 26(e) states in pertinent part:

(e) Supplementing Disclosures and Responses.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due. (Emphasis supplied)

In this case, the parties' pretrial disclosures were due January 26, 2006. CR 26. Plaintiffs still had almost 6 weeks pursuant to this rule in order to supplement opinions and expected testimony of experts. The declarations submitted in response to the summary judgment motion on December 12 were not only consistent with the requirements for contravening affidavits pursuant to Fed. R. Civ. P

56 but also timely and consistent with or Fed. R. Civ. P 26(a)(3) and Fed. R. Civ. P. 26(e). There was no violation of Fed. R. Civ. P 26(a)(2)(B) or CR 26(a)(3).

Fed.R.Civ.P 37 states in pertinent part:

> (c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.
>
> (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

The Ninth Circuit relies on Yeti by Molly v. Deckers, 259 F.3d 1101 (CA 9 Mont 2001), as support for its ruling affirming the district court's dismissal. Yeti is easily distinguished.

In Yeti, the court excluded damages testimony by a defense expert where there was no expert report provided for two years following close of discovery and only one month before trial. Clearly

in this case the reports and depositions were provided timely and again the only assertion is that somehow plaintiffs' experts declarations are in conflict (e.g., 10 days versus 2-4 weeks) with the disclosures, which is not true as stated before.

The striking of plaintiffs' expert declarations by the district court, apparently in their entirety, is a severe sanction that is unjust and unfair to the plaintiffs' case and deprives plaintiff of her day in court to litigate her case on the merits. Any sanction must be "just." Bonds v. District of Columbia Department of Corrections, 93 F.3d 801 (U.S. App. D.C. 1996). In Bonds, the district court entered an order disallowing the defendant to call any fact witnesses for failure to respond timely to interrogatories requesting names of persons with knowledge of the facts. The court held at p. 804 that: "Because the preclusion order denied the District its right to a trial on the merits, we conclude that the district court abused its discretion." The court held that the central requirement of Rule 37 is that "any sanction must be 'just,'" Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982). The court went on to hold at p. 809 as follows:

> When a discovery sanction denies the defendant the right to a trial on the merits, the district court must either make a finding supported by the record that the more severe sanction is necessary to avoid prejudice to the plaintiffs or to the court's calendar or to prevent a benefit to the defendant.....

In Tucker v. Ohtsu Tire and Rubber, 49 F.Supp.2d 456 (D. Maryland 1999), the trial court dealt with a plaintiffs' tire expert who identified two additional opinions in his deposition that were not contained in the disclosure of his testimony.

The expert then did some additional testing some months later and 10 days prior to the discovery cut off, plaintiffs' counsel notified defense of additional opinions. Defense brought a motion to exclude any new opinions. The trial court denied the motion and held at p. 460 that the deposition testimony was a form of supplementation permitted by Rule 26(e)(1) and that the additional opinions regarding the later testing would be allowed since disclosure was within the discovery cutoff and in that case, 4 months before trial with adequate time for another deposition should that be necessary.

Similarly, in Gulfstream v. Philips, 2007 WL 4707080 (D. New Mexico 2007), a defense expert, whose report was not submitted timely, was allowed to testify because the court felt that the parties could minimize any harm that the late disclosure of the report had caused and that the trial schedule would not be interrupted. The court noted that there were still depositions ongoing and that there were still 3 months before trial and that while defense counsel had not exercised the utmost due diligence, the conduct was either harmless or that any harm could be mitigated. This same principle would apply to the case at bar with sufficient time to prepare for trial some two and a half months away.

In Vaughn v. U.S., 542 F. Supp.2d 1331, the district court dealt with a wrongful death claim arising out of medical care. A treating physician, who held an opinion regarding the cause of death, was not disclosed as an expert, only as a treating physician and the court determined no expert report was necessary. The court in Vaughn was faced with the issue of if the testimony was excluded, the case would be dismissed for lack of causation testimony, an issue nearly identical to the one here. The court cited several cases for the proposition that a treating physician was not required to prepare an expert report, Bengston v.

Bazemore, 2007 WL 3307204 (M.D. Ala. 2007), Pellon v. Business Representation, 2007 WL 2994077 (S.D. Fla. 2007), and McKee v. USAA Ins. Agency, 2006 WL 3422238 (N.D. Fla. 2006). The court held that the scheduling order was not violated but reopened discovery for a further deposition of the treating physician and awarded attorney fees for the motion to exclude.

In Fidelity National Title Ins. v. Intercounty National Title Ins., 412 F.3d 745 (7th Cir. 2005), the exclusion of an expert accounting witness was at issue in a case of alleged fraud. The trial court excluded the testimony of plaintiff's only accounting expert based on a failure of the accountant to produce notes that had been generated by him for the litigation. The matter proceeded to trial, the defendants prevailed and the Seventh Circuit reversed and remanded for a new trial with instructions to allow the accountant to testify holding that the exclusion of the testimony could not be deemed harmless. In reversing, the court stated at p. 752 that "in admeasuring sanctions for violating the rules of pretrial discovery, as in other areas of the law, the punishment should fit the crime." Rice v. City of Chicago, 333 F.3d 780, 784 (7th Cir. 2003); Melendez v. Illinois Bell Telephone Co., 79 F.3d 661, 672 (7th Cir. 1996). Here, if there is a "crime," the punishment of exclusion and dismissal is too severe.

In Commonwealth Insurance Co. v. Titan Tire Corporation, 398 F.3d 879 (7th Cir. 2004), the court dealt with claims of indemnity following settlement of a products liability case. Defendant relied on deposition testimony of a plaintiff expert in the underlying tort suit. Plaintiff in the indemnity action sought to exclude that witness for failing to properly disclose the opinion. The motion was denied finding that any discovery violation was harmless since the indemnity plaintiff had

participated in the expert's deposition in the tort case and answers to interrogatories in the indemnity claim made reference to the indemnity defendant's intention to rely on the expert and there was therefore adequate notice. Similarly here, to the extent any portion of the expert declarations are deemed to be violative of any discovery order or discovery rules, defendant has had full and adequate notice of the expert opinions, has had the opportunity to explore them in depositions, knew of them prior to discovery cut off and knew of them from his own experts, all well in advance of trial.

In this case, it would appear, in the apparent absence of any statement to the contrary by the district court judge, that all of plaintiffs' expert declarations are stricken in their entirety. Plaintiffs urge that there is nothing at all that is inconsistent between the disclosures and the declarations.

The only single fact that is not contained in the disclosures is the fact that the experts believe that the abnormal results would first have been detectable at 10 days following initiation of Antabuse. This one fact is in no way inconsistent with plaintiffs' expert statements that the results would have been abnormal during the two to four week time period when follow-up testing should have occurred. This simply establishes when the elevated enzymes would first have been detectible and it in fact supports the disclosure and deposition testimony that the values would have been elevated during the two to four week period following initiation of Antabuse.

The court in determining a decision on a motion to strike, while being vested with discretion, may, pursuant to Fed. R. Civ. P. 56, strike all improper portions of an affidavit used to support or oppose a summary judgment. The court, however, should use "a scalpel, not a butcher knife." Perez v.

Volvo Car Corp., 247 F. 3d 303, 315 (1st Cir. 2001). The court will allow all properly stated facts, while only striking the improper portions. Hollander v. Am. Cyanamid Co., 172 F. 3d 192, 198 (2d Cir. 1999); Lee v. Nat'l Life Assurance Co. of Canada, 632 F. 2d 524 (5th Cir. 1980). Here, the district court failed to be specific and limiting in exactly what part of the declarations it would disregard and apparently is disregarding all of them in their entirety. Applying this principle, the only portion of the declarations which could even be arguably disregarded is the reference to the abnormal liver function tests being first detectible at 10 days. There would still remain, as admissible testimony, everything else, including the inference, which plaintiffs are entitled to, that the enzymes would have been elevated during the two to four week period, thereby precluding summary judgment.

In Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988), the court held that plaintiff failed to identify several potential eyewitnesses to alleged police brutality and excluded the witnesses from testifying. Following a defense verdict, the Second Circuit held on appeal that while the district court has wide discretion in punishing failures to comply with discovery, in this case, it was an abuse of discretion. The court stated at p. 590: "However, we have not hesitated to reverse when a trial court 'permit'[s] in its zeal for clearing its calendar to overcome the right of a party to a full and fair trial on the merits." Citing Beary v. City of Rye, 601 F.2d 62, 63 (2d Cir. 1979). The court in Outley went on to state at p. 591 as follows:

> Before the extreme sanction of preclusion may be used by the district court, a judge should inquire more fully into the actual difficulties which the violation causes, and must consider less drastic responses. "Considerations of fair play may dictate

> that courts eschew the harshest sanctions ... where failure to comply is due to a mere oversight of counsel amounting to no more than simple negligence." Cine Forty-Second Street Theatre Corp v. Allied., 602 F.2d 1062 at 1068. Here the trial judge failed to do either. Hence we must reverse as to the 1984 incident.

Courts have clearly sought out remedies to avoid striking witnesses altogether that would result in dismissal on procedural grounds favoring decisions on the merits.

## I. A District Court is Required to Give All Inferences in Favor of the Plaintiffs Herein as Non-moving Parties.

In ruling on a motion for summary judgment, the trial judge's function is not to himself weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. The law is well established that in reviewing a motion for summary judgment, the court must construe all facts and inferences in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed 202 (1985).

As stated in the dissent by the Circuit Judge M. Smith in the Ninth Circuit decision in which review is sought:

> Luke's initial expert testimony, submitted into evidence far in advance of the discovery deadline, indicated that she would more probably than not have shown abnormal liver functions two to four weeks after she began taking the drug, which, we must reasonably infer, would more probably than not have been

manifest in the tests that should have been given during that time period of two to four weeks.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals,
Ninth Circuit.

Teresa L. LUKE, individually and on behalf of their marital community and as Guardian ad Litem for her minor children; Andrew R. Luke, individually and on behalf of their marital community; Hayden R. Luke; Riley A. Luke,
Plaintiffs-Appellants,

v.

FAMILY CARE AND URGENT MEDICAL CLINICS, a Corporation of Washington State; Robert D. Thornton; Howard Bruce Goodwin Pa-C; Family Urgency Care Clinics Minnehaha; Emergency Rooms, PS; Jerry J. Fisher,
Defendants-Appellees.

No. 08-35192.

Argued and Submitted Jan. 22, 2009.
Filed March 30, 2009.

Christopher Otorowski, Esquire, Susan Carol Eggers, Esquire, Otorowski Johnston Diamond & Golden PLLC, Bainbridge Island, WA, for Plaintiffs-Appellants.

Michael D. Hoffman, Esquire, Janet M. Schroer, Hoffman Hart & Wagner, LLP, Portland, OR, for Defendants-Appellees.

Before: REAVLEY,[1] Senior Circuit Judge, and TALLMAN and M. SMITH, Circuit Judges.

Appeal from the United States District Court for the Western District of Washington, Franklin D. Burgess, District Judge, Presiding, D.C. No. 3:04-cv-05759-FDB.

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[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

A2

## MEMORANDUM

Teresa Luke (" Luke"), Andrew Luke, and their minor children (collectively, "Plaintiffs") appeal the district court's rulings in favor of physician's assistant H. Bruce Goodwin ("Goodwin"), his supervising physicians, and the medical clinic at which they all worked (collectively, the "Clinic Defendants"). The district court excluded as untimely expert declarations submitted by Plaintiffs in response to the Clinic Defendants' motion for summary judgment. Concluding that Plaintiffs' remaining expert disclosures failed to create a genuine issue of material fact regarding causation, the district court then granted summary judgment in favor of the Clinic Defendants. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

We previously remanded this case to the district court to determine the admissibility of the expert declarations submitted by Plaintiffs in response to the Clinic Defendants' summary judgment motion. On remand, the district court granted the Clinic Defendants' motion to strike the declarations. We review the imposition of discovery sanctions for abuse of discretion, "giv[ing] particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)." *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-06 (9th Cir.2001).

A party must submit its expert witness disclosures "at the times and in the sequence that the court orders."Fed.R.Civ.P. 26(a)(2)(C)."Rule 37(c)(1) gives teeth to th[is] requirement[ ]" by automatically excluding any evidence not properly disclosed under Rule 26(a). *Yeti*, 259 F.3d at 1106.

Moreover, where a discovery sanction is properly entered, Rule 37(b)(2)(A)(ii) provides that a court may "prohibit[ ] the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence."Nonetheless, exclusion of evidence under Rule 37(c)(1) is not appropriate if the failure to disclose was either substantially justified or harmless. *Yeti,* 259 F.3d at 1106.

The district court did not abuse its discretion in excluding as untimely the expert declarations submitted by Plaintiffs in response to the Clinic Defendants' summary judgment motion. Plaintiffs disclosed these declarations more than three months after the district court's deadline for initial expert disclosures, and more than two months after the deadline for rebuttal disclosures. Accordingly, these declarations were not timely under Rule 26(a)(2)(C). As Plaintiffs provided no justification-let alone substantial justification-for the untimely submission, this exception to Rule 37(c)(1) automatic exclusion is inapplicable. Nor did Plaintiffs satisfy their burden of proving harmlessness. *See Yeti,* 259 F.3d at 1107. Not only were the disputed declarations filed only four days before the close of discovery and ten weeks before trial, but, as explained *infra,* they presented a new theory as to a key element of Plaintiffs' medical negligence claim. They were properly excluded.

## II

To overcome the Clinic Defendants' motion for summary judgment, Plaintiffs had to establish through admissible evidence that, pursuant to Washington Revised Code § 7.70.040, a genuine issue of material fact existed for each of the two elements of their medical negligence claim: (1) that the Clinic Defendants "failed to exercise that

degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances"; and (2) that the Clinic Defendants' failure to exercise this degree of care "was a proximate cause of Luke's liver failure. We review *de novo* a district court's grant of" summary judgment. *United States v. City of Tacoma,* 332 F.3d 574, 578 (9th Cir.2003).

As to the first element, the Plaintiffs' initial expert witness reports, whose admissibility is not challenged, establish a *prima facie* case supporting breach of the requisite standard of care by the Clinic Defendants. According to these reports, in order to ensure that his patient did not suffer an adverse reaction to Antabuse, Goodwin should have ordered baseline liver function tests when he first saw Luke on March 12, 2002, and he should also have ordered follow-up liver function tests between two and four weeks later. Unfortunately, Goodwin did neither.

Plaintiffs failed, however, to establish a genuine issue of material fact regarding causation. The initial expert reports stated that had "Goodwin obtained a follow-up liver function study within two to four weeks after prescribing Antabuse, more likely than not Teresa Luke'sliver function studies would have been abnormally elevated."Because the experts opined that an adverse reaction would first be detectable at some point "within" two to four weeks, their disclosures create an ambiguity as to whether testing performed prior to the last day of the specified window would have revealed abnormally elevated results. For example, the statement leaves open the possibility that no abnormality would have been detected by a liver function test performed three weeks after Luke

first ingested Antabuse. Only after the summary judgment motion had been filed did Plaintiffs' experts state that the abnormality would have presented itself ten days after Luke started on Antabuse. Accordingly, the district court did not err in entering summary judgment against Plaintiffs on the issue of causation.

III

Plaintiffs nonetheless argue that the district court should have admitted the untimely expert declarations pursuant to Federal Rule of Civil Procedure 26(e), which requires supplementation of an initial expert disclosure "if the party learns that in some material respect the disclosure ... is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."But Rule 26(e) creates a "duty to supplement," not a right. Nor does Rule 26(e) create a loophole through which a party who submits partial expert witness disclosures, or who wishes to revise her disclosures in light of her opponent's challenges to the analysis and conclusions therein, can add to them to her advantage after the court's deadline for doing so has passed. Rather, "[s]upplementation under the Rules means correcting inaccuracies, or filling the interstices of an incomplete report based on information that was not available at the time of the initial disclosure." *Keener v. United States,* 181 F.R.D. 639, 640 (D.Mont.1998).

The district court did not err in concluding that the Plaintiffs' untimely expert declarations were not admissible under Rule 26(e). These new declarations asserted a new theory of causation: "more likely than not, that had [liver function tests] been obtained at anytime beginning *10* days after

initiating Antabuse..., the [liver function tests] would have been abnormally elevated."This new theory did not correct an inaccuracy in the Plaintiffs' original disclosures, nor did it fill in a gap based on information previously unavailable to the Plaintiffs. By offering this new theory advancing an earlier date on which liver function abnormality would have been revealed, the untimely declarations instead impermissibly attempted to fix the weakness, identified by the Clinic Defendants in their summary judgment motion, in Luke's ability to establish causation.

IV

The district court did not abuse its discretion in excluding Plaintiffs' untimely expert declarations and properly entered summary judgment in favor of the Clinic Defendants for failing to establish a *prima facie* case of causation.

AFFIRMED.

M. SMITH, Circuit Judge, dissenting:

I respectfully dissent.

The law is well established that, in reviewing a motion for summary judgment, the court must construe all facts and inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *Agosto v. Immigration & Naturalization Serv.*, 436 U.S. 748, 773 n. 10, 98 S.Ct. 2081, 56 L.Ed.2d 677 (1978) (Powell, J., dissenting) (viewing the facts in the light most favorable to the non-moving party means that the party opposing the summary

judgment is to be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exists); *see also Hunt v. Cromartie,* 526 U.S. 541, 552, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (same).

Under this standard, I believe the court is obligated to interpret the evidence presented as proof that the defendant's failure to perform liver tests two to four weeks after Luke began taking Antabuse was the proximate cause of her liver failure. Luke's initial expert testimony, submitted into evidence far in advance of the discovery deadline, indicated that she would more probably than not have shown abnormal liver functions two to four weeks after she began taking the drug, which, we must reasonably infer, would more probably than not have been manifest in the tests that should have been given during that time period of two to four weeks.

The majority's conclusion that summary judgment is appropriate because the statement presented by the experts "leaves open the possibility that no abnormality would have been detected" is erroneous as a matter of law, because it fails to give the non-moving party the benefit of all reasonable doubts and inferences. It is reasonable to infer that a test given two to four weeks after a certain date will reflect the abnormalities experts have testified will manifest themselves within that same two to four week time period. This inference can be drawn without consulting the untimely expert declarations excluded by the district court.

Accordingly, summary judgment is inappropriate even in light of our decision that the untimely expert declarations were properly excluded. I would therefore reverse the district court's ruling and remand for trial.

B1

United States District Court
W.D. Washington

Teresa L. LUKE and Andrew R. Luke, individually and on behalf of their marital community; and Teresa L. Luke, as Guardian ad Litem for her minor children, Hayden R. Luke and Riley A. Luke, . Plaintiffs,
v.
EMERGENCY ROOMS, P.S., a Professional Service Corporation of Washington State d/b/a Family Care and Urgent Medical Clinics and Family Urgency Care Clinics Minnehaha; Robert D. Thornton, M.D.; Howard Bruce Goodwin, PA-C; Jerry J. Fisher, M.D.; Stephen E. Pliska, M.D., and Darrell M. Miller, M.D.; Hi-School Pharmacy, Inc., a Corporation of Washington State, d/b/a Hi-School True Value Hardware # 4600; and Minnehaha Drugs, Inc. a Corporation of Washington State, d/b/a Hi School Pharmacy, Defendants.
No. C04-5759 FDB.

Feb. 12, 2008.

Christopher Lee Otorowski, Otorowski Johnston Diamond & Golden PLLC, Susan Carol Eggers, Morrow & Otorowski, Bainbridge Island, WA, for Plaintiffs.

Michael D. Hoffman, Stephen R. Rasmussen, Hoffman Hart & Wagner, Portland, OR, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE SUPPLEMENTAL EXPERT WITNESS DECLARATIONS AND GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

FRANKLIN D. BURGESS, District Judge.

This matter comes before the Court on Defendants' motion to strike Plaintiffs' supplemental expert opinions and Defendants' renewal motion for summary judgment. After reviewing all materials submitted by the parties and relied upon for authority, the Court is fully informed and hereby grants the motion to strike, grants Defendants summary judgment, and dismisses Plaintiffs' claims against these remaining Defendants, with prejudice.

## INTRODUCTION AND BACKGROUND

This case involves allegations of medical negligence stemming from the administration of Antabuse leading to a liver transplant for Teresa Luke in July 2002. On November 10, 2004, Plaintiffs brought a number of claims against a group of doctors, physician assistants, pharmacists and medical entities, arising out of Teresa Luke's liver failure. On March 22, 2005, the Court issued a scheduling order that contained the following dates: (1) expert witness disclosure/reports under Rule 26(a)(2) due by August 22, 2005; (2) rebuttal expert witness disclosure/reports due by September 20, 2005; (3) expert objections due by October 20, 2005; (4) discovery deadline, October 31, 2005; and trial, February 27, 2006. The Court extended the discovery deadline to December 16, 2005, and the deadline for filing objections to December 19, 2005, by joint stipulation of the parties.

The parties exchanged their expert disclosures and reports on August 22, 2005, in accordance with the Court's scheduling order. The parties also filed and the Court signed a stipulated order regarding expert witnesses which provided that the expert "reports need not be 'prepared and signed' by each expert" and a "properly disclosed

expert" is permitted to testify about "matters addressed in each expert witness' disclosure" and "any matters addressed in that expert's deposition."The parties exchanged disclosure of rebuttal witnesses on September 20, 2005.

The expert witness disclosures of Plaintiffs' witnesses Dr. Rabin and Dr. Saxon stated that between "two and four weeks" after beginning Antabuse, Ms. Luke's liver function studies would have been abnormally elevated. Had the Clinic defendants obtained follow-up studies within two to four weeks after initiating Antabuse, the studies would, more likely than not, have shown abnormally elevated liver functions.

On November 18, 2005, Defendants Emergency Rooms, P.S. d/b/a/ Family Urgency Care Clinics and Family Urgency Care Clinics Minnehaha and Dr Thornton, Dr. Fisher, and Mr. Goodwin, (collectively the Clinic Defendants) filed a motion for summary judgment.[1] The Clinic Defendants argued that, even assuming the truth of Plaintiffs' experts' opinions, Plaintiffs could not establish that the purported breech of the standard of care was the proximate cause of Plaintiff's injury. The Clinic Defendants asserted that in accordance with Plaintiffs' expert testimony, had followup studies been conducted at any time prior to the end of four weeks after initiation of the use of Antabuse, they would have complied with the asserted standard of care, but not, more likely than not, have detected elevated liver functions.

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[1] Defendants Hi-School Pharmacy, Inc., and Minnehaha Drugs, Inc., (pharmacy defendants) moved for, and were granted summary judgment, resulting in the dismissal of claims against the pharmacy defendants on August 31, 2005. Dr. Pliska and Dr. Miller were voluntarily dismissed from the action.

Plaintiffs' response was filed on December 12, 2005, and included five expert declarations that contained opinions on the standard of care and proximate cause. These opinions state that had followup studies begun as any time beginning "ten days" after initiating Antabuse, elevated liver functions would have been detected.

In reply, the Clinic Defendants asked the Court to disregard these supplemental expert declarations filed with Plaintiffs' response as not timely disclosed as expert opinion and as contradictory to prior expert opinion offered by these experts.

On December 22, 2005, this Court granted summary judgment in favor of the Clinic defendants. Without specifically mentioning the supplemental expert declarations, the Court held that Plaintiffs had failed to demonstrate the element of causation.

Plaintiffs appealed and the Ninth Circuit rendered a memorandum decision on August 21, 2007. The decision affirmed the grant of summary judgment for the pharmacy defendants and Dr. Fisher. The Ninth Circuit also affirmed the grant of summary judgment for the Clinic Defendants on Plaintiffs' failure to warn claims. The Ninth Circuit vacated this Court's order dismissing the remaining standard of care claim against the Clinic Defendants. The Ninth Circuit states in the memorandum decision:

> ... In this case, whether Luke can raise a genuine issue of material fact may be depend on the admissibility of new evidence contained in Luke's supplemental expert declarations filed

with her opposition to the Clinic's motion for summary judgment. The Clinic raised timely objections and filed a motion to strike the supplemental expert declarations under Federal Rule of Civil Procedure 37(c)(1).

On the record before us, we cannot determine whether the district court considered the supplemental expert declarations and, as a consequence, we do not reach the question whether Luke presented a triable issue of fact against the Clinic. We vacate the district court's grant of summary judgment and remand for the district court to decide on the admissibility of the supplemental expert declarations. The district court may then address anew Luke's motion for summary judgment against the Clinic.

...

Because on the record we are unable to determine whether the district court ruled on the admissibility of the supplemental expert declarations, the district court's order granting summary judgment to the physician's assistant and the doctors supervising the physician's assistant is VACATED AND REMANDED with directions to rule on the Clinic's motion to strike and objections to Luke's late expert declarations and to address anew Lukes' motion for summary judgment against the Clinic. In all other aspects, the district court's order is AFFIRMED.

*Luke v. Family Care and Urgent Medical Clinics,*

No. 06-35056 Memorandum Decision, at 7, 9-10.[2]

Upon remand, this Court entered a stipulated order requesting the Clinic Defendants file a formal motion to strike the supplemental expert declarations. The defendants have filed the motion to strike and renewed their motion for summary judgment.

## FAILURE TO DISCLOSE EXPERT OPINION

On March 22, 2005, the entered a Scheduling Order setting out deadlines to govern this case, including the deadlines for disclosure of expert witnesses and rebuttal expert witnesses and their reports pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. The deadlines were (1) expert witness disclosure/reports under Rule 26(a)(2) due by August 22, 2005; (2) rebuttal expert witness disclosure/reports due by September 20, 2005; (3) expert objections due by October 20, 2005; (4) discovery deadline, October 31, 2005. By stipulation the discovery deadline was ordered extended to December 16, 2005 and the deadline for filing expert objections to December 19, 2005. By further stipulated order, the expert reports need not be prepared and signed by each expert, and a "properly disclosed expert" is permitted to testify about matters addressed in each expert witness' disclosure and any matters addressed in that expert's deposition. Plaintiffs' supplemental expert declarations did not comply with the scheduling orders and Fed.R.Civ.P. 26(a)(2). All of Plaintiffs' experts in initial disclosures stated that the change in liver functions could not be detected until sometime between two and four weeks after

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[2] All parties agree that the Ninth Circuit's reference to Luke's motion for summary judgment is intended to reference the motion for summary judgment of the Clinic Defendants.

initiation of Antabuse, thereby acknowledging that on a more likely than not basis, the elevated liver levels would not be detectable until the 28th day after Ms. Luke started taking Antabuse. It was not until response to the motion for summary judgment that these experts (and newly-named experts) opined that testing ten days after initiating Antabuse would have revealed elevated liver functions.

The requirements of Fed.R.Civ.P. 26(a)(2) are not complex and must be complied with to assure a level playing field for all parties. The parties must disclose expert witnesses and provide a expert witness report. An expert witness report shall be in writing and must include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.Fed.R.Civ.P. 26(a)(2)(B).

Clearly, the supplemental declarations filed by the Plaintiffs in response to the motion for summary judgment and after the deadline for rebuttal expert disclosure do not meet the disclosure requirements for experts pursuant to Fed.R.Civ.P. 26(a)(2)(B) and do not provide for a level playing field.

Fed.R.Civ.P. 37(c) provides for the exclusion of an expert witness if the discovery rules have not been complied with. Rule 37(c) states:

> (1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording a opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

Failure to comply with expert disclosure authorizes the court to exclude the expert. This is a self-executing and automatic sanction. The Ninth Circuit has explained that "even absent a showing in the record of bad faith or willfulness, exclusion is an appropriate remedy for failing to fulfill the required disclosure requirements of Rule 26(a)." *Yeti By Molly Ltd. v. Decker Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.2001)."The sanction of exclusion is thus automatic and mandatory unless the party to be sanctioned can show that its violation of Rule 26(a) was either justified or harmless." *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir.1996). In order to avoid the sanction of exclusion, Plaintiffs have the burden of establishing a "substantial justification" for not filing of the supplemental expert declarations and that the late disclosure was "harmless" to the Clinic defendants. *Yeti By Molly Ltd.*, at 1107;

The Court finds under the procedural and factual background of this case, the Plaintiffs have failed to carry their burden. Plaintiffs have provided no justification for failing to comply with the Court's Scheduling Order. Plaintiffs simply claim the declarations do not contain new opinion, but "only some additional specificity." In other words, Defendants have not been prejudiced. The test is not whether the Clinic defendants have been "prejudiced." The test is was the late disclosure in the form of the supplemental expert declarations "harmless." The late disclosures are more than mere additional specificity. Prior to the motion for summary judgment and the experts disclosure deadline, the experts opined that elevated liver functions would be elevated and detectable two to four weeks after initiation of Antabuse. The disclosures did not specify any particular time within this range, other than the last day, that testing, more likely than not, would have revealed the elevated liver function levels. The late disclosures redefined these disclosures by stating that elevated levels would have been detected ten days after initiation of Antabuse. The Clinic Defendants clearly have been harmed as summary judgment (lack of evidence of causation) could be granted in their favor based on the non-compliance of Plaintiffs.

The Ninth Circuit has expressly disallowed such untimely filed expert evidence, including evidence presented in opposition to summary judgment motions. *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097, 1103 (9th Cir.2004). See also, *Calvatia v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1255, 1258 (9th Cir.1998) (upholding exclusion of untimely statements and report by expert submitted in opposition to motion for summary judgment).

Therefore, the testimony, opinions and information provided by Plaintiffs' experts is strictly limited to that which was disclosed prior to summary judgment and the expiration of the disclosure deadlines.

## SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.* ., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The party moving for summary judgment bears the burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case."*Id.* Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial."Fed.R.Civ.P. 56(e). Mere allegations or denials do not defeat a moving party's allegations. *Id.; Gasaway v. Nw. Mut. Life Ins. Co.* ., 26 F.3d 957, 960 (9th Cir.1994). The court may not make credibility determinations, and inferences to be drawn from the facts must be viewed in the light most favorable to the party

opposing the motion. *Masson v. New Yorker Magazine,* 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991); *Anderson,* 477 U.S. at 249.

Summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to the non-moving party's case and upon which the non-moving party will bear the burden of proof at trial. *Celotex Corp.,* at 322.If the non-moving party fails to make such a showing on any essential element, "there can be no 'genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."*Id.* at 323.Summary judgement may be imposed based on absence of evidence excluded for failure to comply with Rule 26(a). See *Wong v. Regents of the Univ. of California,* 379 F.3d 1097, 1103 (9th Cir.2004).

The Court previously considered the evidence in light of Defendants' motion for summary judgment and held Plaintiffs failed to demonstrate the element of causation. Because of the exclusion of the supplemental expert reports leaves the Plaintiffs without any expert testimony necessary to establish causation, the Clinic Defendants are entitled to a grant of their motion for summary judgment on the standard of care claim.

## CONCLUSION

For the foregoing reasons, Clinic Defendants motion to strike Plaintiff's supplemental expert opinions will be granted, there being no genuine issue of material fact, the Defendants are in entitled to summary judgment.

ACCORDINGLY;

IT IS ORDERED:

(1) The Clinic Defendants' Motion to Strike Plaintiffs' Supplemental Expert Opinions [Dkt. # 106] is GRANTED.

(2) The Clinic Defendants' Renewal of Motion for Summary Judgment [Dkt. # 105] is GRANTED.

(3) The Clerk may enter Judgment for these remaining defendants.

DATED this 12th day of February, 2008.

/s/ Franklin D. Burgess
Franklin D. Burgess, J.

C1

United States Court of Appeals,
Ninth Circuit.

Teresa L. LUKE, individually and on behalf of their marital community and as Guardian ad Litem for her minor children; Andrew R. Luke, individually and on behalf of their marital community; Hayden R. Luke; Riley A. Luke, Plaintiffs-Appellants,

v.

FAMILY CARE AND URGENT MEDICAL CLINICS, a Corporation of Washington State; Robert D. Thornton, M.D.; Howard Bruce Goodwin, PA-C; Family Urgency Care Clinics Minnehaha; Hischool Pharmacy, Inc., a Corporation of Washington State, d/b/a Hi-School True Value Hardware # 4600; Minnehaha Drugs Inc., a Corporation of Washington State, d/b/a Hi School Pharmacy; Emergency Rooms, PS; Jerry J. Fisher, Defendants-Appellees.

No. 06-35056.

Argued and Submitted Aug. 7, 2007.
Filed Aug. 21, 2007.

Christopher Otorowski, Esq., Carol N. Johnston, Esq., Susan Carol Eggers, Esq., Otorowski Johnston Diamond & Golden PLLC, Bainbridge Island, WA, for Plaintiffs-Appellants.

Janet M. Schroer, Esq., Michael D. Hoffman, Stephen R. Rasmussen, Esq., Hoffman Hart & Wagner, LLP, Portland, OR, Joanne Henry, Esq., Peter John Kesling, Esq., Sloan Bobrick & Oldfield, University Place, WA, for Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington, Franklin D. Burgess, District Judge, Presiding. D.C. No. CV-04-05759-FDB.

C2

Before: CANBY, TASHIMA, and CALLAHAN, Circuit Judges.

MEMORANDUM

Plaintiff Teresa Luke appeals from the district court's grant of summary judgment in this diversity medical malpractice suit against certain doctors from the Family Care and Urgent Medical Clinic ("Clinic") who did not detect her idiosyncratic fulminant liver failure and the Hi-School Pharmacy ("Pharmacy") that provided her with Antabuse. The parties are familiar with the facts, and we do not repeat them except where necessary to the disposition of this case.

We review the district court's grant of summary judgment de novo, and we affirm on all of Luke's claims against the Pharmacy and Dr. Fisher in their entirety. We also affirm the district court's grant of summary judgment to all defendants on the failure to warn claims under Washington's informed consent law. As for Luke's standard of care claims against the physician's assistant and the supervising doctors from the Clinic, however, we vacate the district court's order and remand for a ruling on the admissibility of Luke's supplemental expert declarations and the new evidence concerning causation.

I.

Luke contends that the 1 in 25,000 chance of liver failure was a material risk, and therefore the Clinic had a duty to warn her about the risk under Washington's informed consent law.[1] *See* Wash.

[1] To the extent Luke attempts on appeal to recharacterize the risk as a 1 in 4 chance of abnormal liver enzyme levels, we

Rev.Code § 7.70.050. The district court examined the evidence and concluded that the 1 in 25,000 to 1 in 40,000 chance of liver failure was not material as a matter of law, and therefore the Clinic had no duty to warn Mrs. Luke of that risk under Washington's informed consent law. Washington's informed consent law requires a plaintiff to show:

> (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
>
> (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
>
> (d) That the treatment in question proximately caused injury to the patient.

Wash. Rev.Code § 7.70.050(1). Under Washington state law, "[t]he informed consent doctrine 'does not place upon the physician a duty to elucidate upon all of the possible risks, but only those of a serious nature.' " *Smith v. Shannon,* 100 Wash.2d 26, 666 P.2d 351, 354-55 (1983) (quoting *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wash.2d 12, 499 P.2d 1, 9 (1972)). "[U]nless a risk is serious-whether characterized as grave, medically significant, or reasonably foreseeable-and unless expert testimony can establish its existence, nature, and likelihood of occurrence, the presence of risk, as a matter of law, is not material and no

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refuse to consider the argument. *See Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1004 (9th Cir.2002).

duty of disclosure manifests in the health care provider." *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wash.App. 625, 784 P.2d 1288, 1292 (1990).

In this case, there is no dispute that the risk of Mrs. Luke's particular, "idiosyncratic" reaction to Antabuse was, at the most, 1 in 25,000. In *Ruffer*, the Washington Court of Appeals held that, as a matter of law, a 1 in 20,000 to 50,000 risk of colon perforation incident to a sigmoidoscopy was not foreseeable, and therefore immaterial as a matter of law. 784 P.2d at 1292-93; *see also Smith v. Shannon*, 666 P.2d at 357-58 (affirming directed verdict on an 8.6 in 1 million to .05 percent chance of phlebitis and collecting cases); *Mason v. Ellsworth*, 3 Wash.App. 298, 474 P.2d 909, 919-20 (1970) (concluding .75 chance was not material as a matter of law). Luke failed to establish that the risk of fulminant hepatitis was foreseeable and material, therefore, the Clinic had no duty to warn her about the risk when prescribing Antabuse. The district court's grant of summary judgment on Mrs. Luke's failure to warn theory was proper and we affirm.

II.

Luke alleged separate causes of action for falling below the standard of care against Dr. Fisher and the physician's assistant who conducted the initial screening and prescribed Antabuse and the physician's assistant's supervising physicians. A duty to follow the standard of care may exist independently of a duty to warn. On appeal, Mrs. Luke argues that the Clinic owed her a duty of care to order baseline and follow-up liver function tests and to order a liver function test when Dr. Fisher examined her for her tick bite. Although she concedes that the baseline liver function tests would probably have been normal, Mrs. Luke

argues that a follow up test within two to four weeks may have shown elevated liver enzymes that would show emergent liver damage.

To bring a cause of action for violating a duty of care under Washington's medical negligence law, a plaintiff must prove the following elements:

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

Wash. Rev.Code § 7.70.040. Expert testimony is required to show causation. *See Morinaga v. Vue,* 85 Wash.App. 822, 935 P.2d 637, 642 (1997) (noting need for expert testimony to show prudence of a practice and causation). An expert opinion that is merely a conclusory statement without adequate supporting facts is insufficient to defeat a summary judgment motion. *Guile v. Ballard Cmty. Hosp.,* 70 Wash.App. 18, 851 P.2d 689, 693 (1993).

A.

Mrs. Luke does not allege or contend that Dr. Fisher was negligent in treating the tick wound, or that his treatment of the tick wound proximately caused her liver failure. In addition, Mrs. Luke failed to establish that a health care provider would have ordered a liver test when treating a patient for a tick bite simply because the patient was on Antabuse. *See*Rev.Code of Wash. § 7.70.040(1). Washington law does not impose a duty to treat

unsuspected and unknown problems, particularly when the facts before the doctor do not indicate the possibility that there is a problem. *See Gates v. Jensen,* 92 Wash.2d 246, 595 P.2d 919, 923-24 (1979) (imposing a duty to investigate only "when other diagnostic procedures are inconclusive for some reason, or when a red flag of warning has been raised by some abnormality"). Other than conclusory statements by Mrs. Luke's experts, there was no evidence that established that, in the course of treating Mrs. Luke for a tick bite, and without Mrs. Luke even experiencing symptoms relating to liver damage, Dr. Fisher would have, or should have ordered liver function tests. Therefore, the district court properly granted summary judgment to Dr. Fisher.

B.

Luke also alleged that a physician's assistant's failure to order a baseline liver function test, and follow up liver function tests caused her liver failure. In this case, whether Luke can raise a genuine issue of material fact may depend on the admissibility of new evidence contained in Luke's supplemental expert declarations filed with her opposition to the Clinic's motion for summary judgment. The Clinic raised timely objections and filed a motion to strike the supplemental expert declarations under Federal Rule of Civil Procedure 37(c)(1).

On the record before us, we cannot determine whether the district court considered the supplemental expert declarations and, as a consequence, we do not reach the question whether Luke presented a triable issue of fact against the Clinic. We vacate the district court's grant of summary judgment and remand for the district court to decide on the admissibility of the

supplemental expert declarations. *See Johnson v. Hawe,* 388 F.3d 676, 686 (9th Cir.2004). The district court may then address anew Luke's motion for summary judgment against the Clinic.

III.

The district court also granted summary judgment on Luke's claims against the Pharmacy, finding that it did not have a duty to warn Luke about possible side effects. In *McKee v. American Home Products Corp.,* 113 Wash.2d 701, 782 P.2d 1045, 1048-49 (1989), the Washington Supreme Court held that pharmacists do not have a duty to warn consumers of the potential risks of a drug. Washington applies the "learned intermediary" doctrine, which places the duty to warn patients and to monitor drug usage on the physician. *Id.* at 1049-50. Under Washington law, a pharmacist "has a duty to accurately *fill* a prescription and to be alert for clear errors or mistakes in a prescription". *Id.* at 1055 (emphasis in the original). "The pharmacist does not, however, have a duty to question a judgment made by the physician as to the propriety of a prescription or to warn customers of the hazardous side effects associated with a drug, either orally or by way of the manufacturer's package insert." *Id.* at 1055-56. In this case, the district court properly decided that the risk of liver failure was not material and that the physician's assistant had no duty to warn Mrs. Luke of the danger. Under Washington law, it would be contradictory to require a pharmacist to warn of the same danger when the "learned intermediary" had no duty to warn.

Mrs. Luke attempts to avoid the effect of *McKee* by introducing pharmacist opinions concerning the duty of care under a provision in the Washington Administrative Code that requires a

pharmacist to "determine the amount of counseling that is reasonable and necessary under the circumstance to promote safe and effective administration of the medication and to facilitate an appropriate therapeutic outcome for that patient from the prescription." Wash. Admin. Code § 246-869-220(3) (2007). The regulation specifically states that, "[t]he purpose of this counseling requirement is to educate the public *in the use* of drugs and devices dispensed upon a prescription." Wash. Admin. Code § 246-869-220 (emphasis added). The plain language of the regulation restricts a pharmacist's role to counseling concerning the safe and effective administration of the medication, and does not impose any requirement to explain medical risks. As explained in *McKee,* the pharmacist's duty under the Washington Administrative Code is to provide "nonjudgmental information, not affecting a decision to take or continue using a drug, such as: whether to take the drug on an empty or full stomach, substances to avoid while using the drug, or not to drive or use heavy machinery while taking the drug." *McKee,* 782 P.2d at 1052. The Pharmacy did not violate any cognizable legal duty to Luke. Therefore, we affirm the district court's grant of summary judgment.

Because on this record, we are unable to determine whether the district court ruled on the admissibility of the supplemental expert declarations, the district court's order granting summary judgment to the physician's assistant and the doctors supervising the physician's assistant is VACATED AND REMANDED with directions to rule on the Clinic's motion to strike and objections to Luke's late expert declarations and to address anew Luke's motion for summary judgment against the Clinic. In all other respects, the district court's order is AFFIRMED. Each party shall bear its own costs.

D1

United States District Court,
W.D. Washington.
Teresa L. LUKE and Andrew R. Luke, individually and on behalf of their marital community; and Teresa L. Luke, as Guardian ad Litem for her minor children, Hayden R. Luke and Riley A. Luke, Plaintiffs,
v.
EMERGENCY ROOMS, P.S., a professional service corporation of Washington state d/b/a Family Care and Urgent Medical Clinics and Family Urgency Care Clinics Minnehaha; Robert D. Thornton, M.D.; Howard Bruce Goodwin, PA-C; Jerry J. Fisher, M.D.; Stephen E. Pliska, M.D.; and Darrell M. Miller, M.D.; HI-School Pharmacy, Inc., a corporation of Washington state d/b/a HI-School True Value Hardware # 4600; and Minnehaha Drugs, Inc., a corporation of Washington state d/b/a HI-School Pharmacy, Defendants.
No. C04-5759FDB.

Dec. 22, 2005.

Christopher Lee Otorowski, Otorowski Johnston Diamond & Golden PLLC, Susan Carol Eggers, Morrow & Otorowski, Bainbridge Island, WA, for Plaintiffs.

Michael D. Hoffman, Stephen R. Rasmussen, Hoffman Hart & Wagner, Portland, OR, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BURGESS, J.

D2

## INTRODUCTION

This cause of action, here pursuant to diversity jurisdiction, arises from Plaintiff Teresa Luke's prescribed use of Antabuse. Luke was charged with DUI on March 12, 2002 and she entered into a voluntary early release agreement pursuant to which she agreed to take Antabuse, contingent upon passing a screening physical examination. She obtained her examination on March 12, 2002 from Defendant Emergency Rooms, P.S., where she had never been seen before that date. She was examined by Physician's Assistant Bruce Goodwin who determined that there were no findings on physical examination or in Luke's reported history that indicated a need for any additional tests, and he wrote the prescription for Antabuse, which Luke began taking that same day.

She saw Defendant Jerry J. Fisher, M.D. for a tick bite in that same clinic on April 30, 2002. ( Luke Dep.) She was treated, was not evaluated or tested related to use of Antabuse, (Fisher Dep.) and Luke reported no liver symptoms at that time ( Luke Dep.).

Luke returned to the clinic on June 3, 2002 complaining of symptoms consistent with an insult to her liver. ( Luke Dep.). Liver Function Tests (LFT) were performed and the Antabuse was stopped. (Ex. 6) Luke was found to have already suffered significant liver damage, and in July 2002 a liver transplant was performed. (Dr. Thornton dep. Ex. 3.)

Luke asserts that her liver damage resulted from the Antabuse and that Goodwin's initial examination fell below the standard of care. Luke alleges lack of informed consent and negligent failure to evaluate, warn, treat, monitor, etcetera.

The parties agree that Washington law applies in this diversity case.

Defendants Dr. Robert Thornton, Dr. Jerry Fisher, Mr. Bruce Goodwin, and Emergency Rooms, P.S. move for summary judgment arguing that Plaintiffs cannot prove that any action or inactions of Defendants caused them harm, that Plaintiffs cannot state an informed consent claim, and that Plaintiffs cannot state any viable claim against Dr. Fisher arising from his entirely unrelated treatment of a tick bite.

## SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the moving party establishes that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Inferences drawn from the facts are viewed in favor of the non-moving party. *T.W. Elec. Service v. Pacific Elec. Contractors,* 809 F.2d 626, 630-31 (9th Cir.1987).

Summary judgment is proper if a defendant shows that there is no evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Failure of proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can exist and summary judgment is mandated. *Celotex,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party "must do more than show there is some metaphysical doubt as to the material

facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

## DISCUSSION

*Health Care Provider Liability*

Under Washington law, RCW 7.70.040 sets forth the "necessary elements of proof that injury resulted from failure to follow accepted standard of care" as follows:

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

Evidence is sufficient if it supports a "reasonable inference" as to all the elements. *Van Hook v. Anderson,* 64 Wash.App. 353, 358, 824 P.2d 509 (1992). When expert medical testimony is involved, a "reasonable inference" must rise to the level of reasonable medical certainty. *McLaughlin v. Cooke,* 112 Wash.2d 829, 836-37, 774 P.2d 1171 (1989). Proximate cause subdivides into cause in fact, and legal cause. *Gall v. McDonald Indus.,* 84 Wash.App. 194, 926 P.2d 934 (1996). Cause in fact is cause *but for* which the injury would not have happened. Legal cause is cause in fact that warrants legal liability as a matter of social policy. *Gall,* 84 Wn.App. At 207.

Defendants begin their argument by pointing

out that Plaintiffs contend that retesting should have been conducted at any time between two and four weeks after Antabuse was started, that is, at any point between March 26 and April 9, 2002. Thereafter, if the test results were normal, no additional test had to be done until the six-month point.. Defendants quote from several of Plaintiff's experts that reflect Plaintiffs' contention. (See Defs.' Opening Br. Pp. 4-6.)

Defendants point to Plaintiffs' expert witnesses' testimony and note that all of Plaintiffs' experts opine that it is more likely than not that abnormalities in Luke's LFTs would have been detected at some unknown and unspecified point between March 26, 2002 and April 9, 2002, and that no witness will testify that it is more likely than not that a problem could have been detected at any particular time within that range, other than the very last day, April 9, 2002. Thus, had Defendants run LFTs at any point before 28 days, Plaintiffs' evidence is that they would have complied with the standard of care, but cannot, and do not, assert that the problem would have been detected. Moreover, the six-month point was well after Luke went to the clinic on June 3, 2002 complaining of symptoms consistent with a liver problem.

Defendants also move for summary judgment on the claim relating to the April 30, 2002 tick bite treatment against Dr. Fisher. Defendants argue that a physician who sees a patient for one condition has no responsibility for entirely unrelated treatment provided by another physician, and it is of no consequence that Dr. Fisher and Mr. Goodwin practice in the same clinic.

Plaintiffs respond reasserting that Defendant Goodwin breached the standard of care

by not ordering follow-up liver function tests or informing her of the material risk of liver injury, and that these failures proximately caused Luke's liver damage.

Plaintiffs respond with respect to the claim against Dr. Fisher that his treatment fell below the standard of care because when Luke saw him for treatment of the tick bite, he failed to obtain liver function studies, and her chart demonstrated that no baseline or follow-up liver function tests had been done since the Antabuse was prescribed.

Plaintiffs' response is insufficient to overcome Defendants' showing on summary judgment. Plaintiffs have failed to demonstrate the element of causation. Defendants have demonstrated that there is no genuine issue of material fact and that there is insufficient evidence to support the essential element of causation regarding Plaintiffs' health care provider claims. With respect to the claims against Dr. Fisher, no recognized legal theory is presented by Plaintiffs. Defendants are, therefore, entitled to summary judgment on the claims of health care liability.

*Informed Consent*

The necessary elements of proof for a claim of failure to secure informed consent are set forth in RCW 7.70.050(a)-(d):

> (a) That the health care provider failed to inform the patient of a material fact or facts relating to treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

> (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
>
> (d) That the treatment in question proximately caused injury to the patient.

A risk is deemed material and must be disclosed when a reasonable person in the patient's postion probably would attach significance to the specific risk in deciding on treatment. *Miller v. Kennedy,* 11 Wash.App. 272, 287, 522 P.2d 852 (1974), *aff'd per curium,* 85 Wash.2d 151, 530 P.2d 334 (1975). The court in *Villaneuva v. Harrington,* 80 Wash.App. 36, 906 P.2d 374 (1995) described the two-step process used to determine whether a risk is material:

> (1) the scientific nature of the risk must be ascertained (the nature of the harm and the probability of its occurrence), and (2) the trier of fact must then decide whether that probability is a risk which a reasonable patient would consider in deciding on treatment.

*Id.* at 37, 906 P.2d 374. The first step of this determination of materiality requires expert testimony, but the second step does not. *Smith v. Shannon,* 100 Wash.2d 26, 33, 666 P.2d 351 (1983). The inapplicability of standard of care testimony as it pertains to informed consent was discussed further by the court in *Miller:*

> There is no need to prove what other doctors might tell their patients in similar circumstances. The doctor has a duty to disclose the material risks as a matter of law. The testimony of medical

> experts is not necessary to establish the duty to disclose that which the law requires. Once the existence of a risk has been established by expert medical testimony, there is no need to take the next step and also prove by expert medical testimony that the doctor should have told the patient about the risk. Once it has been established by expert medical testimony that a risk existed, the existence of the risk is the patient's business; and it is not for the medical profession to establish a criteria for the dissemination of information to the patient based upon what doctors feel the patient should be told.

11 Wash.App. at 284-86, 522 P.2d 852.

Defendants point out that Plaintiffs' experts concede that the incident rate for Luke's idiosyncratic reaction to Antabuse is extremely rare, being between one in 25,000 and one in 40,000. In arguing the materiality issue with respect to such a rare occurrence, Defendants cite *Ruffer v. St. Frances Cabrini Hosp. Of Seattle,* 56 Wash.App. 625, 784 P.2d 1288,*review denied,* 114 Wash.2d 1023, 792 P.2d 535 (1990) where a patient suffered a perforated bowel during a sigmoidoscopy procedure. The undisputed evidence was that perforation was a one in 20,000 to 50,000 risk, and the court held that warning of such a rare occurrence was not required to obtain a patient's informed consent.

Defendants also argue that even if the risk of a rare complication had been imparted to her, Plaintiffs must prove that a reasonably prudent patient under Luke's circumstances would not have consented to treatment. Luke's situation was that

her alternative was jail time, and Defendants argue that faced with the one in 25,000 risk of complication, no reasonable patient would have chosen jail time over treatment carrying such a low risk.

Defendants also argue that, in any event, consent was obtained, because when Luke obtained her Antabuse prescription from Emergency Rooms, P.S., she signed a form that advised her of risks of Antabuse, including "the ultimate possibility of unconsciousness and/or death."( Luke dep., Thornton dep. Ex. 3.)

Plaintiffs respond that Defendant Goodwin failed to obtain Luke's informed consent because he did not make her aware of the material risk of hepatitis. Plaintiffs discuss what is known about the side effects of Antabuse and go on to submit expert opinion that while Luke was informed of the possibility of unconsciousness and death, Goodwin did not inform Luke of the risk of liver injury and hepatitis. Plaintiffs argue that it is up to the trier of fact to determine whether the risk no matter how great or small is a risk that a reasonable patient would consider in deciding on treatment.

Under Washington law and the authorities cited, no material risk existed and no warning was required in this case where the risk was 1 in 25,000 to 40,000. Plaintiffs have submitted no evidence to persuade the Court otherwise. Accordingly, Plaintiffs have stated no informed consent claim.

## CONCLUSION

For the foregoing reasons, there being no genuine issues of material fact, and Defendants being entitled to judgment as a matter of law, , Defendants' Motion for Summary Judgment must

be granted.

NOW, THEREFORE, IT IS ORDERED: Defendants' Motion for Summary Judgment [Dkt. # 63] is GRANTED and the Clerk may enter Judgment for the remaining defendants.

/s/ Franklin D. Burgess
Franklin D. Burgess, J.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

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No. C04 5759 FDB

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TERESA L. LUKE AND ANDREW R. LUKE, INDIVIDUALLY AND ON BEHALF OF THEIR MARITAL COMMUNITY; AND TERESA L. LUKE AS GUARDIAN AD LITEM FOR HER MINOR CHILDREN, HAYDEN R. LUKE AND RILEY A. LUKE, Plaintiffs,

v.

EMERGENCY ROOMS, P.S., A PROFESSIONAL SERVICE CORPORATION OF WASHINGTON STATE D/B/A FAMILY CARE AND URGENT MEDICAL CLINICS AND FAMILY URGENCY CARE CLINICS MINNEHAHA; ROBERT D. THORNTON, M.D.; HOWARD BRUCE GOODWIN, PA-C; JERRY J. FISHER, M.D.' STEPHEN E. PLISKA, M.D. AND DARRELL M. MILLER, M.D.; HI-SCHOOL PHARMACY, INC., A CORPORATION OF WASHINGTON STATE, D/B/A HI-SCHOOL TRUE VALUE HARDWARE #4600; AND MENNEHAHA DRUGS, INC. A CORPORATION OF WASHINGTON STATE, D/B/A/ HI SCHOOL PHARMACY, Defendants

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Joint Motion for Approval of Stipulation Regarding Expert Witnesses, and Order

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(Filed: September 26, 2005)

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## I. INTRODUCTION AND MOTION

Come now the parties hereto and jointly move the Court for an Order approving a stipulation between the parties regarding expert witnesses. By their stipulation the parties agree

1) that detailed expert reports will be exchanged, in accordance with FRCP 26(a)(2)(B), but that such reports need not be "prepared and signed" by the expert, and

2) that, in addition to matters addressed in the expert witness disclosure statements to be exchanged by all parties, expert witnesses are also permitted to testify regarding any matters which were addressed in their depositions.

## II. STIPULATION

The parties hereby stipulate as follows:

1) Expert disclosures and reports will be exchanged in accordance with the calendar established by the Court, but such reports need not be "prepared and signed" by each expert; and

2) In addition to being permitted to testify about matters addressed in each expert witness' disclosure, a properly disclosed expert is also permitted to testify regarding any matters addressed in that expert's deposition.

The purpose if the foregoing stipulation is, respectively, 1) to facilitate preparation and exchange of reports and 2) to allow testimony regarding relevant matters which may have been omitted from the disclosure statements, where the omission causes no prejudice since the omitted matter was addressed in an expert's deposition.

Respectfully submitted.

Dated this 20th day of September 2005.

/s/ Stephen R. Rasmussen
Stephen R. Rasmussen, WSB

So Stipulated and Moved.

Dated this 19th day of August 2005.

/s/ Christopher L. Otorowski
Christopher L. Otorowski, WSB

**ORDER**

The foregoing motion came before the Court on the stipulation of the parties. The Court, having considered the foregoing Stipulation and Motion, and good cause appearing therefore, HEREBY APPROVES the foregoing Stipulation.

Dated this 26th day of September 2005.

/s/ Franklin D. Burgess
Franklin D. Burgess, J.